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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/684,883

10/06/2000

Bernard R. Brodeur

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04/12/2006

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EXAMINER

NAVARRO, ALBERT MARK

ART UNIT

PAPER NUMBER

1645

DATE MAILED: 04/12/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/684,883

Applicant(s)

BRODEUR, BERNARD R.

Examiner

Mark Navarro

Art Unit

1645

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 16 March 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 16 March 2006. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: 127-129,200-203 and 207.
Claim(s) rejected: 124,133-137,170-174,180-184,187-199,204-206 and 208-211.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See attached.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☐ Other: _____.

ADVISORY ACTION

Applicants amendment filed March 16, 2006 has been received and entered. Claims 1-123, 125, 130, 138-157, 161-162, 175-179, and 185-186 have been cancelled. New claims 210-211 have been added. Consequently, claims 124, 126-129, 131-137, 158-160, 163-174, 180-184, and 187-211 are pending in the instant application, of which claims 126, 131-132, 158-160, and 163-169 have been withdrawn from further consideration as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. The rejection of claims 124, 133-137, 170-174, 180-184, 187-199, 204-206, and 208-209 under 35 U.S.C. 102(b) as being anticipated by Merks et al is maintained. Additionally, this rejection is applied to newly submitted claims 210-211.

Applicants are asserting that claims 9-13 of Merks are not original claims, but were filed on December 1993 to replace original claims. Applicants further assert that Merks is not enabling since the hybridoma used to identify their polypeptide is not publicly available. Applicants finally assert that there is no indication that the ELISA procedure described by Merks utilizes an "isolated" antigen, rather than a mixture of antigens from bacteria.

Applicants arguments have been fully considered but are not found to be fully

persuasive.

First, Applicants assert that claims 9-13 of Merks are not original claims, but were filed on December 1993 to replace original claims. Applicants point is less than fully clear. Are Applicants claiming an earlier effective filing date than the non-original claims of Merks? The publication date of December 1993 is still a 102(b) date.

Second, Applicants assert that Merks is not enabling since the hybridoma used to identify their polypeptide is not publicly available. However, the precise hybridoma described by Merks is not required to isolate the claimed antigen. Merks describes the method for extracting outer membrane proteins from the bacteria as described by Johnston et al. (See page 4). The resulting proteins were then combined with BSA and administered to mice. It would be merely routine experimentation to screen for hybridomas which bind a 20 kDa surface antigen, the same 20 kDa antigen from Neissera described as isolated by Merks.

Finally, Applicants assert that there is no indication that the ELISA procedure described by Merks utilizes an "isolated" antigen, rather than a mixture of antigens from bacteria. Applicants appear to be overlooking the big picture. An ELISA, as defined by dictionary.com is a "sensitive immunoassay that uses as enzyme linked to an antibody as a marker for the detection of a **specific protein**." (Emphasis added). It is completely routine in the art to isolate the detected protein, corresponding precisely to what is claimed by Merks, an isolated 20 kDa antigen.


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Claims 127-129, 200-203 and 207 are objected to for depending upon a rejected base claim, however claims 127-129, 200-203 and 207 are free of the prior art of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark Navarro whose telephone number is (571) 272-0861.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynette Smith can be reached on (571) 272-0864. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Mark Navarro
Primary Examiner
April 10, 2006